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ILLINOIS COMMERCE COMMISSION
STATE OF ILLINOIS

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COMMERCE COMMISSION

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CHIEF CLERK'S OFFICE

Recycling Services (RSI))
)
-vs-) 04-0614
)
The Peoples Gas Light and Coke)
Company)
)
Complaint as to People's refusing to)
supply natural gas service as requested)
by RSI in Chicago, Illinois)

RESPONDENT'S
DRAFT ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

On October 8, 2004, Recycling Services, Inc. (RSI) (hereinafter referred to as "RSI" or "Complainant") filed a Verified Formal Complaint with the Illinois Commerce Commission ("Commission") against The Peoples Gas Light and Coke Company ("Respondent") alleging that it had been denied gas service by Respondent and requesting that Respondent provide gas service immediately and further requesting unspecified money damages for Respondent's failure to provide gas service to its facility at 3152 South California Avenue, Chicago, Illinois.

On October 22, 2004, RSI filed a Verified Amended Formal Complaint and a written Motion for an Immediate Order to Provide Gas Service and for Expedited Decision. On November 15, 2004, Respondent filed a Reply to the Motion.

This matter came on for status hearing before a duly authorized Administrative Law Judge ("ALJ") on November 18, 2004. A subsequent status hearing was held on January 20, 2005. On January 18, 2005, Respondent filed a written Motion requiring the parties file written testimony. RSI filed a written response to this Motion. The ALJ denied the Motion at the January 20, 2005 status hearing.

On January 31, 2005, Respondent filed a Motion for Summary Judgment contending that as of January 26, 2005, gas service was being provided to RSI and the Commission lacked jurisdiction to award money damages to RSI. RSI filed a written response to the Motion for Summary Judgment and Respondent filed a further reply. On February 16, 2005, the ALJ issued his ruling stating that the Commission has no authority to award damages, but may determine whether Respondent violated various sections of the Illinois Public Utilities Act ("Act"). Thereafter, on February 17, 2005, Respondent

filed a Motion in *Limine* requesting that the evidence in this matter be limited only to issues of service lines and that evidence concerning gas mains and easements other than service easements be barred. Complainant did not file a response as required under 83 Ill. Adm. Code 200.190(e).

On April 12, 2005, an evidentiary hearing was held. Both RSI and Respondent were represented by counsel. Respondent's Motion in *Limine* was taken under advisement by the ALJ; however, the ALJ admitted Complainant's Exhibits 1-5 into evidence, which were easements, or other land rights, but were not for service lines. A Joint Stipulation of facts and documents was agreed to by the parties and subsequently made part of the record. RSI presented two witnesses: John Koty, President of Sandman, Inc., the consultant for RSI responsible for project design and development and utility arrangements; and Susan Morakalis, Senior Assistant Attorney for the Metropolitan Sanitary District of Greater Chicago ("MWRD"). Respondent presented three of its employees as witnesses: John Saigh, a Sales Supervisor; Bradley Haas, Manager of Engineering Services; and, Steven Matuszak, Manager of Environmental Affairs. At the conclusion of the hearing on April 12, 2005, the record was marked "Heard and Taken."

The ALJ ordered the parties to file their Initial Briefs on June 3, 2005 and their Reply Briefs, together with any Proposed Orders on July 5, 2005.

A copy of the Administrative Law Judge's Proposed Order was served on the parties.

Complainant's Position

Complainant contends that it took over three years for it to obtain gas service at its recycling facility at 3152 South California Avenue, Chicago, Illinois (the "Property"). Therefore, the principal contention of its complaint is that this lengthy delay in obtaining service violated Section 8-101 and 9-241 of the Illinois Public Utilities Act ("Act") (220 ILCS 5/8-101 and 5/9-241), which require Respondent to provide utility service to a customer reasonably entitled thereto without delay and without discrimination.

Complainant provided its timeline to show that it was not provided gas service by Respondent without delay. On March 15, 2001, Complainant contacted Respondent seeking gas service for its recycling facility on the Property. On March 20, 2001, Mr. Saigh wrote Mr. Koty and acknowledged the request for service and agreed to provide the service. The length of the service was approximately 1,200 feet. From March 15, 2001 through December 9, 2001, Complainant exchanged plans for the service line to be provided to the Property. Complainant was now seeking gas service to the Property by having the Respondent provide a 2-inch service line running through a 10 foot wide MWRD easement for a distance of 30 feet. Complainant informed Respondent that it would have to enter into an easement agreement with the MWRD. The lease agreement between the MWRD and Complainant required that any modification to the Property would have to be approved by the MWRD.

During 2002 and up to September 9, 2003, Complainant obtained the necessary permits to construct its recycling facility on the Property. On September 9, 2003, Mr. Koty sent a memorandum and drawings to Mr. Saigh informing him that the project was going forward. On December 14, 2003, Mr. Koty sent a facsimile message to Mr. Joseph Tassone of Respondent requesting an absolute date for Peoples to submit an easement request to the MWRD (Joint Stipulation Exhibit 19; Tr. 58). An easement agreement would be issued by the MWRD upon request. On January 14, 2004, Ms. Morakalis sent a Memorandum to Mr. Tassone rejecting Respondent's standard easement agreement that had been sent to her on January 8, 2004, and providing MWRD's Standard Easement Agreement. On February 7, 2004, Mr. Koty sent a Memorandum to Mr. Ralph Barbakoff of Respondent requesting a forecasted easement in service date by the end of February 2004. (Joint Stipulation Exhibit 22)

In various letters and facsimiles between the MWRD and Respondent, the MWRD continued to point out that it was willing to grant an easement to Respondent. Complainant notes, in particular Ms. Morakalis' letter to Ms. Elizabeth Ritscherle, attorney for Respondent of May 25, 2005, in which Ms. Morakalis pointed out that Respondent had entered into numerous easements with the MWRD using the MWRD's standard easement agreement. (Joint Stipulation Exhibit 29)

On July 1, 2004, Mr. Koty sent a facsimile letter to Mr. Tassone again trying to get information on the construction of the service line because the water and sewer service lines were going to be installed and Mr. Koty did not want to destroy the new concrete driveway. On July 13, 2004, when Mr. Tassone had not responded to the facsimile, Mr. Koty filed an informal complaint with the Commission because he was convinced that he would not get service from Respondent. Mr. Koty considered this a last ditch effort to move the process along. (Tr. 80) On July 15, 2004, the MWRD Board approved the form of an easement with the Respondent. (Joint Stipulation Exhibits 38 and 39) On August 24, 2004, Althoff Industries, RSI's general contractor, made a written request of Mr. Barabakoff asking him to provide information regarding when the gas meter would be installed (Joint Stipulation Exhibit 41). Mr. Barbakoff responded that he could not answer until Respondent was granted reasonable access. Finally, on December 3, 2004, the MWRD and Respondent entered into an easement agreement. On August 30, 2004, Mr. Koty received a response to the informal complaint from Mr. John Riordan of Respondent stating that Respondent was unwilling to accept the MWRD's easement form for a small diameter gas service. (Joint Stipulation Exhibit 43; Tr. 90) On that basis, Mr. Koty filed a formal complaint.

Thereafter, to begin construction, Complainant installed temporary LP gas for construction heat until gas service was provided on January 26, 2005.

Mr. Koty summed up the problem with the delay in having the easement as follows; "...one of the greatest problems was the interruption with construction sequencing." He explained: "We were forced to delay construction..., building a new apron and entryway from California and, actually construction work in the driveway,...."

He stated: "I didn't want to do installation work that I wasn't certain was going to be acceptable to Peoples,...." (Tr. 88).

Ms. Morakalis presented the position of the MWRD in its dealing with the Respondent. She pointed out that the five easements between the MWRD and Respondent, as set forth in Complainant's Exhibits 1-5, that Respondent had executed referring to them as the MWRD's "Standard Easement" agreement. She contended that the final easement agreement executed by the parties gave Respondent free access to the Property. She contended that there were no major changes made to the MWRD's July 15, 2004 draft standard easement agreement that was submitted to the MWRD Board and the one finally executed by the Respondent on November 20, 2004. (Complainant's Exhibit 6)

Complainant contended that there were inordinate delays caused by Respondent in executing the final easement agreement. Ms. Morakalis testified that one of the delays was dealing with Mr. Koty rather than directly with her. (Tr. 148) In her judgment, she thought it should have taken 3-4 months to negotiate the easement with Respondent. (T. 153) Mr. Koty thought that it was typical to negotiate the easement in six months. (Tr. 92)

Complainant contended that Respondent violated Sections 8-101, 8-404 and 9-241 of the Act by failing to provide gas service to the Property without delay and without discrimination. As a result, Complainant contended that it is entitled to damages, including attorney's fees, pursuant to Section 5-201 of the Act, from the Respondent for the losses it incurred due to this failure to provide gas service without delay and without discrimination. Complainant contended that it has a statutory and regulatory right to gas service. Complainant points out that only when faced with a hearing on the complaint, did Respondent enter into the MWRD's standard easement agreement. Complainant contended that the Respondent should have routinely signed the MWRD's standard easement agreement as it had in other past easement agreements. Complainant contended that by not dealing directly with the MWRD, Respondent caused an unnecessary delay in negotiating an easement. Complainant argued that Respondent's refusal to sign the same easement agreement with the MWRD that it has in the past wrongfully caused the delay and was discrimination under Sections 8-101 and 9-241. Complainant contended that the "free access" issue raised by the Respondent was a "pretext" to not providing service to the Complainant. Complainant contended that Respondent's distinction between providing service to a single customer, the Complainant, and multiple customers is unlawful discrimination against the Complainant.

Complainant contended that the Commission has broad powers to grant the relief requested by the Complainant, citing *Peoples Gas Light and Coke Co. v. Illinois Commerce Commission*, 222 Ill. App. 3d 388, (1st Dist. 1991). The Commission, as an administrative agency has wide latitude to accomplish its responsibilities. *Freedom Oil v. Illinois Pollution Control Board*, 275 Ill. App. 3d 508, 655 N.E. 2d 1184 (4th Dist. 1995). (Other citations omitted) Complainant also cites *Wernikoff v. RCN Telecom Services of Illinois*, 791 N.E. 2d 1195 (1st Dist. 2003) which described the Commission's role in

hearing complaints and the Commission's statutory role under Section 5-201. Complainant contends that under the *Wernikoff* decision, court jurisdiction "co-exists" with that of the Commission where the issue involves a violation of the Act. The Complainant requested that the Commission consider its broad authority under the Act, under Sections 4-201, 10-208 and 5-201 so that the Complainant is not left without a remedy where it has a right to service.

Respondent's Position

Respondent maintained that it did not violate Section 8-101 of the Act. It provided gas service to Complainant in as reasonably prompt a manner as possible given the facts and circumstances presented in this complaint. Respondent maintained that the Complainant situation is a somewhat unique situation. It is unique because Respondent was not dealing with the owner of the Property as the customer. It was also unique that the required installation for the property was a 2-inch service line and the MWRD, as Complainant's landlord, insisted upon its standard easement agreement which was not tailored for the provision of a service line to serve a single customer, the Complainant.

On January 8, 2004, Respondent sent its standard easement agreement for a service line to the MWRD. On January 14, 2004, the MWRD rejected that agreement and offered its own standard easement agreement. Respondent maintained that had the MWRD executed Respondent's standard easement agreement, no complaint would have been filed.

Respondent contended that Complainant, not Respondent, had the obligation to obtain the easement from the MWRD. Respondent noted that its tariff, Peoples General Terms and Conditions of Service, Ill.C.C. No. 27, Second Revised Sheet No. 24 (Respondent's Cross Exhibit 1), required the Complainant to provide the Respondent with "free access" to the Property. Mr. Saigh testified that he notified Mr. Koty in March 2001 that it was Complainant's obligation to obtain the easement and free access to the Property in March 2001. He further testified that Respondent installs 2,000 services per year and that the single service line easement request made in the last five years was made by Mr. Koty on behalf of the Complainant. (Tr. 181)

Respondent contended that in the last five years it made 11,000 service line connections and, besides the Complainant's, there were only five other service line easement requests. Mr. Haas provided some detail of those service line easements, Respondent's Exhibits 2-6, and noted that all the parties, except the State of Illinois, executed Respondent's standard service line easement agreement. Mr. Haas explained that the State of Illinois easement was accepted by Respondent because it was not detrimental to the Respondent. (Tr. 192)

Both Mr. Haas and Mr. Matuszak reviewed Complainant's Exhibits 1-5, the MWRD easements with Respondent, and each noted that in each instance the MWRD easement agreements were not for service lines, but were for large installations serving all of Respondent's customers, such as a transmission line (Complainant's Exhibit 1), soil

borings for a regulator station (Complainant's Exhibit 2), a regulator station (Complainant's Exhibit 3), a tunnel under a river (Complainant's Exhibit 4), and a 42-inch main (Complainant's Exhibit 5). (Tr. 193-198 & 236-37) Mr. Matuszak further testified that Complainant's Exhibits 1-5 go back to 1967, 1978 and were at places where Respondent already had facilities worth tens of millions of dollars. Mr. Matuszak explained the history of the five easement agreements with the MWRD, whereby as these agreements came up for renewal, the MWRD required environmental provisions. Mr. Matuszak confirmed that the removal of those older mains would cost millions of dollars and that was the basis for agreeing to the MWRD required environmental provisions in Complainant Exhibits 1-5. (Tr. 236-237) Mr. Matuszak also noted that service lines, not mains are covered by Respondent's General Terms and Conditions tariff. (Tr. 236)

Respondent contended that the provisions of the MWRD's standard easement agreement were onerous and burdensome. It was only after the MWRD agreed to remove many of the objectionable provisions in the MWRD easement agreement that Respondent executed the agreement. The objectionable provisions, business, operational and environmental, were first outlined by Mr. Barbakoff in a letter to Mr. Koty on March 23, 2004. Mr. Barbakoff stated that the Respondent had several concerns regarding the MWRD standard easement forwarded by Ms. Morakalis on January 14, 2004, including: 1) lack of detail and exhibits; 2) the easement was not perpetual; 3) Complainant needed to provide financial assurances for the financial obligations that Respondent would have to assume; and 4) a full review of the provisions particularly the environmental provisions ("Full Article IX") would be costly and Complainant would have to reimburse Respondent for its legal costs. In addition, Mr. Barbakoff stated that the Respondent was willing to provide service to the Complainant upon the Complainant providing reasonable access. (Joint Stipulation Exhibit 24). On April 2, 2004, Ms. Morakalis sent a fax letter to Mr. Barbakoff with a revised MWRD Easement Agreement (Joint Stipulation Exhibit 25). Ms. Morakalis responded to certain issues raised by Mr. Barbakoff in his March 23, 2004 letter including: 1) providing an exhibit; 2) offering a 35-year term; 3) offering a nominal \$10 annual easement fee; and 4) stating that the MWRD's intent on the environmental section Full Article IX, was only that Respondent assume its responsibility under the law.

On May 13, 2004, Ms. Ritscherle provided greater detail regarding Respondent's operational and environmental objections to the MWRD standard easement agreement. (Joint Stipulation Exhibit 28) In 20 paragraphs, she detailed Respondent's issues with the latest MWRD easement draft. In paragraph 4, she requested language barring any building over the service and in paragraph 20, she referenced substitute language attached to the letter that would actually provide for Respondent to assume its responsibilities under the law. (Tr. 215-16) On May 25, 2004, Ms. Morakalis replied to the 20 paragraphs in Ms. Ritscherle's May 13, 2004 letter. The letter stated in paragraph 4 that the MWRD added language barring building over the service, but in paragraph 20 that Full Article IX must stand as originally drafted. She also threatened that if Respondent maintained its position, the MWRD would take a different stance with future easements including significantly raising the cost. (Tr. 240-41) Mr. Matuszak testified that the

threat was significant to Respondent because many of the other easements it has with the MWRD that it will need to renew in the future are for significant facilities. (Tr. 248-49)

On June 17, 2004 Ms. Ritscherle responded to Ms. Morakalis' May 25, 2004 letter. (Joint Stipulation Exhibit 30) She detailed Peoples' continued concern with the latest draft. For instance, there still was no prohibition against building over the service as required by the Department of Transportation and Peoples, not the MWRD, would have to decide on the proper design. Most importantly, Peoples continued to object to Article IX.

On June 23, 2004 Ms. Morakalis responded to Ms. Ritscherle's letter. (Joint Stipulation Exhibit 31) She reiterated the MWRD's position on its unwillingness to change Full Article IX because the MWRD does not differentiate on the use of the easement. She stated that the MWRD will change the easement to bar building over the service.

Between June 23 and July 15, 2004, there were various correspondences between Mr. Koty and Ms. Morakalis and Ms. Elizabeth Ritscherle outlining and attempting to work out various issues raised by the conflicting easement agreements of Peoples and the MWRD (Joint Stipulation Exhibits 32-35). On July 15, 2004, the MWRD approved a draft Easement Agreement that was forwarded under cover letter with the same date from Ms. Morakalis to Ms. Ritscherle. (Joint Stipulation Exhibits 37-38) Ms. Morakalis mentions a change to Full Article IX in the cover letter and the attached draft easement was the first draft where the MWRD made any changes to the environmental provisions. Mr. Matuszak testified that the easement was not acceptable by the Respondent because it still had conditions that were not acceptable. (Tr. 223-24)

Additional attempts were made to conclude an easement agreement between Peoples and the MWRD. On September 14, 2004, a Revised Easement was sent by Ms. Morakalis to Ms. Ritscherle (Joint Stipulation Exhibit 45). As the fax cover page indicates, three significant changes were made to Article IX ("Revised Article IX"). First, the MWRD removed the term natural gas from the definition of hazardous materials in Article IX, Section 9.01(B)(1). Although Ms. Morakalis testified that as soon as Peoples requested the deletion of natural gas from the definition of hazardous waste the MWRD was prepared to make the change, this was the first easement draft with the change. (Tr. 170-71) Second, Section 9.06 was changed to eliminate certain installation requirements related to containing environmental contamination. Finally, Section 9.08(E) was changed so that Peoples would only need to undertake remediation if the remediation was related to a release of natural gas. The changes eliminated the requirement of Peoples undertaking environmental assessments on the renewal or termination of the easement. (Tr. 228)

Negotiations continued until November 3, 2004 when the MWRD forwarded the easement that the MWRD and Peoples executed. The significant change between the September 14, 2004 and November 3, 2004 drafts was the elimination of a requirement that Peoples report to the MWRD minor gas leaks at the Property. (Tr. 226-27)

Respondent executed the Easement Agreement for the Property on November 15, 2004 and the MWRD did so on December 3, 2004. (Joint Stipulation Exhibit 54) On January 26, 2005, gas service was provided to the Property. (Joint Fact Stipulation 58) Mr. Koty testified that prior to turning on the service Peoples performed, at its own cost, a second pressure test on the 1,200 feet of service that RSI had installed. (Tr. 87)

Mr. Matuszak outlined the environmental concerns. He testified that the Full Article IX provisions were onerous because of the inclusion of natural gas in the definitions of hazardous materials and the related investigative and remediation duties that it placed on the Respondent. (Tr. 206-07 & 210) Mr. Matuszak went on to describe the changes made by Ms. Morakalis to the easement agreement first, in her May 25, 2004 letter to Ms. Ritscherle (Joint Stipulation Exhibit 29). Next, after the July 15, 2004 MWRD Board approved easement agreement, Mr. Matuszak described changes in the environmental provisions. (Tr. 225-226; Joint Stipulation Exhibit 45) Mr. Matuszak described why the changes in the environmental provisions were considered significant. They were significant because of the costs involved in performing Phase I or Phase II environmental assessments due to a leak at the facility and the required remediation of the easement when Respondent vacates the facility. (Tr. 229) Ms. Morakalis acknowledged some of the easement agreement concessions. As examples, Respondent only had to pay a nominal fee rather than the fair market value for the easement; revisions were made to Article IX, the environmental provision; the MWRD agreed not to permit structures over Respondent's utilities; and, Respondent did not have to indemnify the MWRD for negligent acts.

On the issue of a delay in providing service to the Property, Respondent contended that there is no way to determine a reasonable time in which it could be determined that there was a violation of Section 8-101 of the Act. The easement was a somewhat unique, third-party situation between the Respondent and the MWRD. The MWRD not only insisted upon dealing with the Respondent itself, but also its lease with the Complainant required it. Moreover, the MWRD insisted that its standard easement agreement be executed by Respondent. Respondent contended that the MWRD standard easement agreement was not suitable for a service line easement agreement. Respondent contended that it has the right and the obligation on behalf of all of its customers to negotiate reasonable easement terms. Both sides made concessions so that service could be provided to the Complainant. Respondent contended that the time involved was not unreasonable given that Respondent came to the negotiation table from different perspectives. Respondent viewed the easement issue from the perspective that it was providing a service line to serve a single customer and the MWRD from the perspective of being the protector of the public lands.

Respondent contended that a review of the Joint Stipulation clearly indicates that it dealt with the Complainant and the MWRD in good faith. No particular timeline could be established in which an easement agreement should have been executed. Respondent contends that Ms. Morakalis acknowledged that her only other negotiation with Peoples, the 95th Street and the Skyway project (Tr. 166) took a year to resolve itself into an agreement with the Respondent. (Tr. 168)

Respondent contended that the Complainant never provided reasonable notice because it never provided a date when gas service was required. Respondent contended that the Complainant only requested a date when gas was available, but did not indicate a date for completion of the Property facilities. Respondent pointed to the facts that the Complainant did not receive building permits from the City of Chicago until July or August, 2004; water and sewer lines were not in the ground until August 2004; electricity and telephone service to the Property was provided around Christmas 2004, and the Complainant did not occupy its administration building until February-March 2005. (Tr. 116-119) Thus, Respondent contended that aside from the "requirement that Complainant provide 'free access,'" until the Complainant provided a specific date when gas service was required, the Respondent was not obligated under Section 8-101 of the Act to provide service to the Property.

Respondent contended that the Respondent was an applicant for service as defined in 83 Ill. Adm. Code 200.40. Respondent contends that under its tariff, General Terms and Conditions, Respondent's Cross Exhibit 1, Ill.C.C. No. 27, Second Revised Sheet 24, the Complainant was obligated to provide the Respondent with "free access" to the Property and thus the Complainant, not the Respondent was obligated to provide the easement required by the MWRD. Mr. Saigh informed Mr. Koty of the responsibility to provide the easement in March 2001, which Mr. Koty initially accepted, but further advised the Complainant that the Respondent would have to obtain the easement from the MWRD. Respondent pointed to the fact that Ms. Morakalis acknowledged that the Respondent was provided "free access" only when the parties executed a final agreement on the easement in December 2004. (Joint Stipulation Exhibit 54; Tr. 144) Up until December 2004, the Complainant had not met its legal obligation to provide the free access necessary to install the 2-inch service pipe to the property and the Respondent had no duty to install the service pipe prior to being provided "free access" in December 2004 and had no right to be on the Property.

Respondent contended that it provided service "without delay" to the Complainant in compliance with Section 8-101. Peoples contended that the factual circumstances are somewhat unique for three reasons: 1) Complainant's landlord, the MWRD, required an easement that was not Respondent's standard service line easement; 2) the Complainant refused to be responsible for its duty to provide "free access;" and, 3) the MWRD "Standard Easement" agreement was not tailored to providing a service to a single customer, the Complainant. (Tr. 162-163) As indicated by the Joint Stipulation documents, Respondent pointed out that throughout the negotiations between it and the MWRD, they negotiated in good faith. Concessions were made by both parties, and there is no evidence that the Respondent delayed or refused to provide service to the Complainant.

Respondent further contended that it did not delay in providing service to the Complainant once the final easement was fully executed. Respondent pointed out that the MWRD did not execute the final easement until December 3, 2004 and the service was provided on January 26, 2005. Respondent contended that this short time period was

taken up with the holiday season winter weather and the need for the Respondent to pressure test the Complainant's own pipe installation. Respondent noted that the Complainant never objected to the time it took to install the service line subsequent to the MWRD executing the easement agreement.

Respondent also contended that it did not discriminate in providing service to the Complainant. There is no evidence showing any discrimination. The lack of discrimination is underscored by the testimony and Joint Stipulation. Moreover, the Respondent contended that if it had executed the MWRD's "Standard Easement" agreement provided on January 14, 2004, it would, in effect, have discriminated against the other five parties who executed Respondent's standard service line easement in the last five years.

Respondent contended that the Complainant did not provide any evidence of any other violations of the Act. Specifically, while the Complainant contended in its complaints and opening remarks at the evidentiary hearing that the Respondent violated Sections 8-404 and 9-241 of the Act, no evidence was presented regarding these alleged violations.

Respondent requested that the Commission urge the MWRD to include the revised Article IX language in future "Standard Easement" agreements with the Respondent. Ms. Morakalis indicated that language which barred building over the pipe and those changes made to Article IX were minor for the MWRD, could be made without MWRD Board approval and would still be included in the definition of a MWRD "Standard Easement." (T. 156-59 & 170-71) Respondent requested that in its best interests and those of its customers that the Commission in its final order urge the MWRD to agree to the minor concessions as described by Ms. Morakalis in her testimony, in future land rights documents it grants to the Respondent.

Respondent contended that it has not violated Sections 8-101 and 9-241 of the Act. Respondent contended that the ALJ ruled correctly that the Commission cannot award damages to the Complainant pursuant to Section 5-201 of the Act. Respondent noted that the Complainant failed to cite any Commission orders wherein the Commission awarded damages to a complainant pursuant to Section 5-201 because there are no cases.

As applied to this complaint, Respondent contended that Section 8-101 states that the Respondent is required to provide its service line under the MWRD property easement "without discrimination and without delay." Respondent contended that Complainant provided no testimony or evidence of discrimination under Section 8-101. Respondent contended that the easement agreement was not fully executed until December 2004 and was the result of direct, substantive negotiations where both the Respondent and the MWRD made concessions, many of which were considered substantive by the Respondent. Respondent contended that its single service line easement agreement that was provided to the MWRD in January 2004 was routine and, if signed by the MWRD, no complaint would have been filed. Respondent contended that

its tariff required the Complainant, as the applicant for service to provide "free access" to the easement and that "free access" was not provided until the easement agreement was executed and this was acknowledged by MWRD witness Morakalis. Respondent contended that the distinction between providing service to a single customer such as the Complainant and many customers does not amount to discrimination either under Section 8-101 or 9-241 of the Act.

Respondent contended that Section 9-241 of the Act cannot be applied to the instant complaint case. Respondent contended that Section 9-241 applies to rate discrimination between classes of customers, not single line users and many users. Section 9-241 also applies to discrimination between different localities within a utility's service area and so it bears no relationship to the alleged discrimination between the Complainant as a single customer being served through an individual service pipe and mains that serve many customers.

Respondent contended that the Commission lacks statutory and legal authority to award damages to the Complainant. On this issue, the Respondent agreed with the ALJ's ruling on February 16, 2005, that found that the Commission could not award damages. Respondent pointed to three cases in support of its position that the Commission could not award damages, citing *Barry v. Commonwealth Edison Company*, 374 Ill. 473, 29 NE2d 1014 (1940); *Ferndale Heights Utility Company v. Illinois Commerce Commission*, 112 Ill.App. 3d 175, 445 NE2d 334 (1st Dist. 1982); and, *Moenning v. Illinois Bell Telephone Company*, 139 Ill. App.3d 521, 487 NE2d 980 (1st Dist. 1985). Respondent contended that the Complainant could not point to a single case or Commission Order in a complaint matter where the Commission awarded damages. Respondent cited four cases in which the Commission ruled that the circuit court and not the Commission has the authority to award damages under Section 5-201. *People of the State of Illinois v. Illinois Bell Telephone Company*, Docket 88-0127, Order dated October 2, 1991 (Commission has no authority to determine or award damages under Section 5-201 rather the authority lies squarely in the courts, at 4); *Patricia Morgan v. Illinois Bell Telephone Company*, Docket 91-0280, Order dated October 23, 1991 (actions for monetary damages under Section 5-201 belong in a court of law, at 1); *Scott Leber v. GTE North Incorporated*, Docket 92-0352, Order dated April 7, 1993 (no showing of actual damages and proper forum for damages is a court of law, at 2); and, *Citizens Utility Board v. Illinois Bell Telephone Company*, Docket 00-0043, Order dated January 23, 2001 (Section 5-201 authorizes redress in circuit court for damages caused by a public utility's acts or omissions that violate laws or Commission regulations or orders, at 5). Respondent contended that the law on this issue has been well settled for twenty years and that the cases cited are on point. Respondent pointed out that the Illinois Legislature has not made a substantive change to what is now Section 5-201 since 1939.

Respondent noted that in the case of *Peoples Gas Light and Coke Company v. Illinois Commerce Commission*, 222 Ill. App. 3d 738, 584 NE2d 341, 343 (1st Dist 1991), the Appellate Court held that the Commission had jurisdiction to interpret the Family Expense Act, the Court held that Peoples Gas did not seek damages, but payment for the service it provided. Thus, had Peoples Gas sought damages, the proper venue would be a

civil court, not the Commission. Respondent contended that the Complainant improperly cited the case of *Wernikoff v. RCN Telecom Services of Illinois*, 341 Ill. App. 3d 89, 791 NE 2d 1195 (1st Dist. 2003). Respondent contended that in the *Wernikoff* case, the Court concluded that the Commission had exclusive jurisdiction over rate reparation claims, but that under Section 5-201, courts had jurisdiction over damages. (*Id.*, 341 Ill. App. 3d 94-94, 102, 791 NE 2d 1200, 1205-1206)

Finally, Respondent argued that its Motion In *Limine* should be granted. Respondent contended that testimony and evidence relating to gas mains and concerning land rights for other than service easements are not relevant to the providing of a 2-inch service line to the Property. The provision of service lines is covered in Respondent's tariffs, Respondent's Cross Exhibit 1. Thus, Respondent sought to bar a substantial portion of Ms. Morakalis' testimony and the admission of Complainant Exhibits 1-5.

Commission Analysis and Conclusions

The Complainant's principal contention in this complaint is that pursuant to Section 8-101 of the Act, Respondent failed to provide gas service to the Complainant's Property "without discrimination and without delay." Respondent, on the other hand, focuses on the language in Section 8-101 that only requires Respondent to provide an applicant service when the applicant is "reasonably entitled" to such service. Respondent argues that Complainant was not reasonably entitled to service until it had provided Respondent "free access" as required under Peoples' tariff and that "free access" was not provided until the final easement was fully executed in December 2004. Section 8-101 reads, in relevant part, as follows: "Every public utility shall, upon reasonable notice, furnish all persons who may apply therefore and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay." The Complainant has the burden of proof to demonstrate that the Respondent violated Section 8-101. The Complainant must make this demonstration by a preponderance of the evidence presented.

The positions of the parties are fully outlined in previous sections of the Order. The Commission will only summarize the positions in this portion of the Order. Complainant's contention is based upon its claim that it applied for gas service in March 2001 and did not receive gas service from Respondent until January 2005. Complainant contends that Respondent discriminated against the Complainant because it was a single service line user and Respondent refused to provide service to the Property. Complainant further contends that it did not deal in good faith with the MWRD because it: 1) refused to sign the MWRD Standard Easement Agreement, an easement agreement it had accepted several times in the past; 2) refused to deal directly with the MWRD; 3) took an inordinate period of time to negotiate the easement; and 4) only executed the easement after a formal complaint was filed.

Respondent contends that if its standard easement agreement had been signed by the MWRD in January 2004, service would have been provided to the Property much earlier than January 2005. Respondent contends that it had legitimate operational,

business and environmental concerns that, until satisfied, the Respondent could not execute the easement agreement. Respondent contends that the concessions made by the MWRD were significant, not minor as claimed by the Complainant. Respondent contends that no discrimination was shown, that the testimony of its witnesses and the Joint Stipulation indicate good faith negotiations with the MWRD. Respondent contends that no timeline can be applied to the easement negotiations because this was a somewhat unique, one-of-a-kind situation between Respondent, Complainant and Complainant's landlord, the MWRD. Importantly, Respondent contends that Complainant's attempt to shift the burden of providing "free access" to Respondent and force Respondent to enter into the earlier draft MWRD easement violates Peoples' tariff. Additionally, if the Commission finds that Peoples could not negotiate an appropriate easement, Peoples and its other customers would be exposed to substantial risk and cost if an applicant wanted to shift its environmental remediation costs to Peoples through an easement.

The first issue that the Commission must determine is whether the Respondent violated Section 8-101 of the Act by failing to provide gas service to the Complainant "without delay." It is apparent from the evidence presented that service could not be provided to the Property until an easement agreement was fully executed by the Respondent and the MWRD. That agreement was fully executed on December 3, 2004. The fact that the MWRD was either copied or directly sent correspondence during the negotiations is only indicative of the fact that the Complainant was an applicant for gas service, not the MWRD, and the Complainant had to provide "free access" to the Respondent in accordance with the Respondent's tariff, as approved by the Commission. Negotiations had gone on for almost eleven months. Both the Respondent and the MWRD made concessions resulting in a signed easement agreement. The negotiations between the Respondent and the MWRD took a substantial period of time because neither side had dealt with an easement for a service line where not only were the negotiations with a third party, not the applicant for service, but the Respondent and the MWRD had a different approach to dealing with the single service line easement. It appears that the Respondent and the MWRD each dealt in good faith attempting to work out their differences. The Commission, unlike the Complainant, cannot place a particular time period for the negotiations. A specific time period for negotiations cannot be determined and would be unfair to the Respondent. Since the Complainant has not made a claim of unreasonable delay in providing service between December 3, 2004 and the date service was provided, January 26, 2005, the Commission will not consider that time period in making its decision regarding the issue of "without delay." Given the facts and circumstances as fully set forth in the preceding sections of this Order and upon review of the Joint Stipulation, the Commission is of the opinion that the Respondent provided gas service to the Property "without delay." Thus, as to this issue, the Respondent did not violate Section 8-101 of the Act.

The second issue to be determined is whether Respondent discriminated against the Complainant as an applicant for gas service in violation of Section 8-101. The evidence does not indicate any discrimination. No evidence has been provided indicating that the Respondent refused to provide service. On the contrary, in March 2001 and three years later in March 2004, Respondent advised the Complainant that it would provide

service. (Joint Stipulation Exhibits 4 and 24) Service could not be provided until the easement agreement was fully executed in December 2004 and it was not until December 2004 that the Respondent was given "free access" to the Property. The fact that the Complainant was a single line customer created a distinction in the way service was to be provided, but this was not discrimination. This is the reason that the Respondent's single line easement agreement is so different than the MWRD easement agreement. The MWRD agreement is not tailored for a service line, but for larger mains and other gas installations. Accordingly, Respondent did not discriminate against the Complainant in violation of Section 8-101.

The third issue to be determined is whether the Respondent was in violation of Section 9-241 of the Act. The "discrimination" referred to in Section 9-241 relates to rate classes and localities and is inapplicable in the instant complaint case. Respondent did not violate Section 9-241.

Since the Commission has determined that the Respondent has not violated any section of the Act, we do not need to determine whether damages should be awarded to the Complainant. We would note, however, that we have never awarded damages to a Complainant under Section 5-201, or any predecessor section of the Act. The case law and prior Commission orders are clear that we cannot award money damages.

Respondent has requested the Commission to urge the MWRD to include the revised Article IX environmental language in future "Standard Easement" agreements with the Respondent. While, we cannot order the MWRD to do so, we urge the MWRD to include the Article IX concessions in future land rights documents it enters into with the Respondent.

Based on the foregoing, the Complainant has failed to show by a preponderance of the evidence that the Respondent violated any section of the Act. The Commission concludes that the complaint should be denied.

Findings and Ordering Paragraphs

The Commission, having considered the entire record herein, and being fully advised in the premises thereof, finds that:

- (1) Respondent, The Peoples Gas Light and Coke Company, is an Illinois corporation, engaged in furnishing natural gas service in the State of Illinois and, as such, is a public utility within the meaning of the Illinois Public Utility Act;
- (2) the Commission has jurisdiction over the parties and the subject matter herein;

- (3) the findings of fact and conclusions of law set forth in the prefatory portion of this Order conform to the evidence of record and the law and are hereby adopted as findings of fact and law herein;
- (4) Complainant has failed to show by a preponderance of the evidence that the Respondent violated Sections 8-101 and 9-241 of the Illinois Public Utilities Act (220 ILCS 5/810 and 5/9-241);
- (5) Complainant is not entitled to damages pursuant to Section 5-201 of the Illinois Public Utilities Act (220 ILCS 5/5-201);
- (6) all motions, petitions and objections made in this proceeding should be disposed of consistent with the ultimate conclusions contained herein;
- (7) based on the Findings (4) and (5), the subject Complaint should be denied.

IT IS THEREFORE ORDERED that the Verified Complaint and Verified Amended Complaint filed by Recycling Services, Inc. on October 8 and October 22, 2004, respectively, against The Peoples Gas Light and Coke Company, be, and are hereby, denied.

IT IS FURTHER ORDERED that all motions, petitions and objections made in this proceeding which are not disposed of, be and are hereby disposed of consistent with the ultimate conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.


DATED:

BRIEFS ON EXCEPTIONS DUE:

REPLIES ON EXCEPTIONS DUE:

Terrance Hilliard
Administrative Law Judge

Respectfully submitted,
THE PEOPLES GAS LIGHT AND COKE
COMPANY



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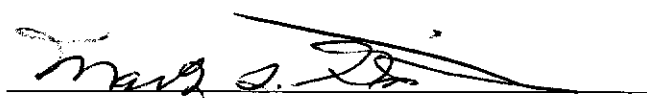
STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Recycling Services (RSI),)	
)	
-vs-)	04-0614
)	
The Peoples Gas Light and Coke)	
Company,)	
)	
Complaint as to Peoples refusing to)	
supply natural gas service as requested)	
by RSI in Chicago, Illinois.)	

NOTICE OF FILING

TO: Parties on Certificate of Service

PLEASE TAKE NOTICE that on July 5, 2005, I filed with the Chief Clerk of the Illinois Commerce Commission the Respondent's Reply Brief and Respondent's Draft Administrative Law Judge's Proposed Order, attached hereto, copies of which are hereby served upon you.


Mark L. Goldstein, Attorney for Respondent
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Northbrook, IL 60062
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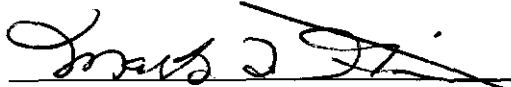
CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2005, I served a copy of the attached Respondent's Reply Brief and Respondent's Draft Administrative Law Judge's Proposed Order, by causing copies thereof to be placed in the U.S. Mail, first class postage affixed, or by facsimile as indicated, addressed to each of the parties below:

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